No. 17762

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

See Vol. 3185

PAUL JOHN CARBO, et al.,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT PAUL JOHN CARBO'S PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

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Appellant Paul John Carbo petitions the Court for a rehearing of its judgment of February 13, 1963, affirming the judgment as to him and pursuant to Rule 23(5) of this Court, respectfully suggests that the rehearing be en banc. Said petition and suggestion are made on the following grounds:

1. The Court's view (slip opinion, 22-27) of the law as to the use to which the jury may put a declaration of an alleged co-conspirator as against a non-present defendant is an important question which, at the least, has never been decided by the Supreme Court or, at the most, is in conflict with the applicable decisions of that Court and the generally prevailing view of the law. Under such circumstances, a hearing en banc should be held.

2. In its opinion (p. 27, f. n. 26) the Court says that an earlier decision of this Court (Oras v. United States, 67 F. 2d 463) is distinguishable from the instant case on the non-present declaration question and states, without mentioning them specifically (save Lutwak v. United States, 344 U. S. 601) that other cases cited by appellant, including those of this Court (e. g. Dolan v. United States, 123 Fed. 52) are likewise distinguishable. We submit that the view of the law as expressed in the decision in the instant case is contrary to that as expressed in the previous cases of this Court and that in effect, the instant decision sub silentia overrules the earlier cases. Not only do we urge that the earlier cases are correct but, in any event, if earlier cases of this Court are to be overruled or disapproved, this should be done, as we understand the procedure, only after consideration by the whole Court en banc.

3. The objection as to the evidence of Sica's (as well as Dragna's) reputation was likewise made by this defendant and the assignment of error in Sica's brief adopted by him. The Court's opinion (p. 30) reads as though this defendant did not object or was not complaining of the admission of this evidence. He did and does because of its use against him.

4. This is also true as to the evidence of Stanley as to Calla (slip opinion, p. 37).

5. The Court upholds (p. 39) on the theory of the state of mind of Leonard, the admissibility of the testimony of Nesseth and McCoy as to what Leonard told them outside the presence of any defendant as to what this defendant is supposed to have told

Leonard. Actually the objection was (Carbo, Op. Br. 65) to Nesseth's and McCoy's testifying to what Leonard said Gibson and Palermo (as well as Carbo) are supposed to have told Leonard. In any event, though objected to, the evidence was not admitted at the trial on the theory of Leonard's state of mind (Carbo, Rep. Br. 55-57). On the contrary, it was admitted generally and for all purposes, including for the truth of the purported statements of the non-present defendant (Carbo, Rep. Br. 49-54, 57, 60-61). As this Court seems to agree (p. 39), the admissibility of that evidence for the truth thereof is improper; yet it was so admitted. The prejudice to this defendant cannot be gainsaid.

6. In its ruling on the Rule 25, F. R. Cr. P. -- successor judge - question, this Court said (p. 46): "We should be inclined to emphasize demeanor rather than credibility as the vital factor upon the question here presented." If this be so, then in this case, where the conflict of evidence is so marked and where the credibility of the prosecution's chief witnesses is so seriously in issue, the demeanor of the witness becomes crucial. The successor judge, no more than this Court, was in no position to make that indispensable value judgment which could come only from seeing the witnesses. While, as appellant views the law, it is, or should be, "that where credibility of government witnesses is a serious issue it must follow ipso facto that a new trial must be held" (slip opinion, p. 46, emphasis added), that broad proposition need not be determined now; only the instant case need be decided here. This Court's reliance (p. 47) on what the successor judge said as to

corroboration does not solve the problem. It is, we respectfully submit, a boot-strap argument for, in assessing the credibility of the corroborating witnesses, it was necessary to take into consideration the demeanor of those witnesses, a function the successor judge could not perform. Nor does the trial judge's charge to the jury give assistance. It is that judge's judgment to which defendant was entitled on the motion for new trial. Since it was impossible, because of the death of the trial judge, to give the defendant the benefit of that judge's judgment, the remedy is not to deny the defendant, but, consonant with the protection the Rule seeks to give the defendant, to grant him a new trial.

In any event, the question is so important, the Court en banc should consider it.

7. The Court considered against this defendant evidence which cannot be considered against him. The Court states (slip opinion, p. 4): "Carbo, with a background of underworld association, emerges as the leader of the conspirators." With due respect, there is no permissible evidence in the trial record of this case which supports that statement. If, in making that appraisal, the Court was relying upon the testimony of Gibson, which appears to be the case, judging from the rest of the paragraph of which the sentence above quoted is the first sentence, either before the Kefauver Committee or in Court concerning that testimony, the Court cannot so rely because as the trial court recognized, and so instructed the jury (RT 2692-3, 5050, 5130), that testimony was inadmissible, and was not to be considered, against this nor any

defendant other than Gibson. And, of course, any information outside the trial record of this case cannot be considered here.

CONCLUSION

The petition for rehearing should be granted and the suggestion that the rehearing be en banc should be accepted.

Respectfully submitted,

WILLIAM B. BEIRNE

A. L. WIRIN

Attorneys for Appellant
PAUL JOHN CARBO

CERTIFICATE

I certify that the above Petition for Rehearing is, in my judgment, well founded and that it is not interposed for delay.

/s/ William B. Beirne

WILLIAM B. BEIRNE

No. 17,762.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT.

PAUL JOHN CARBO, et al.,
Appellants,

v.

UNITED STATES OF AMERICA,
Appellee.

On Appeal From the United States District Court for the Southern District of California.

PETITION FOR REHEARING OF FRANK PALERMO, APPELLANT.

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TABLE OF CASES CITED.

PETITION FOR REHEARING OF FRANK PALERMO, APPELLANT.

To the Honorable Stanley N. Barnes, Oliver D. Hamlin, Jr. and Charles M. Merrill, Judges of the United States Court of Appeals for the Ninth Circuit.

Comes now Frank Palermo, appellant in the above entitled matter, and respectfully prays the Court to grant a rehearing.

I. This appellant contended that evidence was illegally obtained by the use of an induction coil device affixed to a telephone, through which a conversation between the appellant Palermo and Leonard was intercepted and a recording made. It was contended by appellant that the admission of the recording was also improper.

a. The Court treated the case as ruled by *Rathbun v. United States,* 355 U. S. 107 (1957). This, however, was error because in *Rathbun,* the sole question before the United States Supreme Court and the sole question decided was whether the contents of a conversation *overheard* on a *regularly* used telephone *extension* with the consent of one party to the conversation were admissible. The Supreme Court observed that the extension was not installed for the purpose of obtaining the evidence but was a regular connection previously placed and normally used.

b. The coil induction device effects an *interception,* and it was so held in *United States v. Stephenson,* 121 F. Supp. 274 (D. C. 1954), which is in conflict with this Court's decision. So also, this Court's decision conflicts with *Schwartz v. Texas,* 344 U. S. 199 (1952) which was not overruled by *Rathbun, supra.*

c. The recording was in violation of the Federal Communications Act, which was called to the attention of the district court and this Court. The Commission regards the use of an induction coil as prohibited by its Orders. See

Report of the Commission, In the Matter of Use of Record ing Devices in Connection with Telephone Service, adopte March 24, 1947, Docket No. 6787, 11 F. C. C. 1033, an orders dated November 26, 1947, and May 20, 1948, 1 F. C. C. 1005, 1008. (See p. 47, Reply Brief of Appellan Carbo, referring to the latter orders.) *Rathbun v. Unite States, supra,* cited by this Court in its Opinion, makes similar reference, 355 U. S. at page 110, footnote 7, ap parently overlooked by this Court.

II. The appellant stated as Specification of Error No. that the trial court completely omitted to instruct th jury in plain words when it should acquit. Appellant con tended that this constituted prejudicial error and pointe out that the trial court studiously avoided the words "no guilty" and "acquit". See pages 7-8, 13-16 of the openin brief of appellant Frank Palermo.

This Court did not discuss or dispose of this Specifica tion of Error, nor did it indicate in any way in its Opinio that it had considered the question.

III. The Court in its Opinion rejected the objection t the instructions of the district court, and the failure to in struct as to this appellant, on the use of hearsay evidenc of acts or declarations of co-conspirators as proof of mem bership in the conspiracy. It did so on the ground that th subject was a matter of admissibility. The Court concede that many cases have held such instruction restricting th use of such evidence to be proper and required. Thi Court's decision on this score is in conflict with the weigh of authority. Its decision is in conflict with *Lutwack v United States,* 344 U. S. 604, 618, 619, which clearly con templates instruction to the jury on the limitations appl cable to evidence of acts or declarations of co-conspirators So also *Glasser v. United States,* 315 U. S. 60. What thi Court has chosen to follow is *dicta* in *Dennis v. Unite States,* 183 F. 2d 201 (C. A. 2). But the Court of Appeal for the Second Circuit, notwithstanding the dicta in *Denni* holds specifically that the restrictive instruction is "re

quired by law''. *United States v. Soblen,* 301 F. 2d 236, 241 (C. A. 2, 1962). This Court proceeded on the theory that the admission of evidence of co-conspirators' acts or declarations is determined by the trial judge upon *prima facie* evidence of conspiracy—*ex* the evidence of such acts or declarations out of the presence of an alleged conspirator. But this being so, it unquestionably remains for the jury to determine whether it will find such evidence to be the fact: the jury must therefore be instructed on the use which it may make of such testimony to insure that hearsay evidence will not "lift itself by its own bootstraps."

As noted by this Court, the district court did instruct the jury on this score *but only as to the defendant Gibson,* and refused to apply the same charge or a requested charge to this appellant. This Court overlooked that the rendering of such charge as to Gibson made it obvious to the jury that the instruction not only did *not* apply to the other defendants, but that exactly the opposite applied to them. This added prejudicial confusion to prejudicial error.

IV. Appellant Frank Palermo adopts the reasons for rehearing stated by each of the other appellants in this cause.

Wherefore, this petition for rehearing should be granted.

Respectfully submitted,

JACOB KOSSMAN,
Attorney for Appellant
Frank Palermo.

Certificate of Counsel.

Counsel for Appellant Frank Palermo certifies that in his judgment this Petition for Rehearing is well founded and that it is not interposed for delay.

JACOB KOSSMAN